



MONTGOMERY COUNTY ETHICS COMMISSION

ADVISORY OPINION

This is a final decision of the Montgomery County Ethics Commission on a request for a waiver, if necessary, of the provisions of the Montgomery County Procurement Law¹ and the Montgomery County Public Ethics Law.² For the purposes of these laws, the requester is a “public employee” of a “county agency.” He is also an employee of a private contractor. The requester has sought, at the suggestion of the Montgomery County Department of Public Works (“DPW”), a waiver that would permit his private employer to bid on a project for the renovation of one of his agency’s buildings. DPW has informed the requester that the contractor needs a waiver from the Commission to participate in the bidding on this project.

Material Facts

In his letter seeking a waiver, the requester stated, in pertinent part, that he had “no involvement whatsoever in developing the design for the [renovation] project, . . . had no input about the design and . . . [had] made no changes to the design.”

My only involvement was signing-off on the final design that was presented to me in my capacity as the then-President of the . . . [agency] This is a volunteer position for which I have never been offered, nor accepted, any pay or other remuneration I now serve in another volunteer capacity. . . .

DPW, however, advised the Commission that the requester served as his agency’s “point of contact and coordinator for” this project. “He attended and participated in all of our design review meetings (approximately 5 meetings). He provided written and verbal review comments.” “Final design drawings were signed off by [him] on behalf of [the agency].” “Throughout the design process, [he] never indicated . . . that he would be representing [a contractor] and that he would be bidding on this project.”

Furthermore, according to the Department, at a “pre-meeting” attended by the Consultant, the County construction representative, and the requester for the purpose of discussing the project’s scope, the pre-bid conference agenda, and other project details

¹ MONT. CO. CODE, Chapter 11B.

² MONT. CO. CODE, Chapter 19A.

prior to the arrival of prospective bidders for a pre-bid conference, the requester “indicated that he [would be] attending the . . . pre-bid conference, representing both the [agency] and [a contractor].” The pre-meeting, therefore, was cancelled, and the requester attended the pre-bid conference as the representative of the contractor.³

Applicable Law

1. The Montgomery County Procurement Law.

The Montgomery County Procurement Law contains a section, entitled “Ethics; Contractor conduct,” that prohibits a contractor engaged in a *procurement matter* with the County from *employing a public employee* whose duties include significant participation in the matter, unless authorized by law or by the Ethics Commission.⁴ For these purposes:

(1) “*procurement*” includes, among other things, a construction contract and “all functions that pertain to obtaining construction services, including description of requirements, selection and solicitation of sources, evaluation of offers, preparation and award of contract, dispute and claim resolution, and all phases of contract administration;”⁵

(2) “*public employee*” includes “any . . . person providing services without compensation to a *County Agency* if that person: (A) exercises any responsibility for government-funded programs, procurement, or contract administration for an agency; or (B) has access to confidential information of an agency that relates to government-funded programs, procurement, or contract administration;”⁶

(3) “*agency or County agency*” includes, among others, the private organization that the requester serves as a volunteer;⁷ and

(4) “*significant participation*” means “direct administrative or operating authority to approve, disapprove, or otherwise decide government action with respect to a specific matter, whether the authority is intermediate or final, exercisable alone or with others, and exercised personally or through subordinates.”⁸

2. The Montgomery County Public Ethics Law.

The express legislative findings and statement of policy underlying the Montgomery County Public Ethics Law (the Ethics Law) are as follows:

³ The Commission understands, from the presence of the DPW in this matter, that the requester’s agency either receives funds from the County or uses property owned by the County. Otherwise, DPW would not be involved in this procurement.

⁴ § 11B-52 (“Public employee, employ, and significant participation, as used in this section, are defined in Chapter 19A”).

⁵ § 11B-1(m).

⁶ § 19A-4(m)(4).

⁷ § 19A-4(g).

⁸ § 19A-13(c).

(a) Our system of representative government depends in part on the people maintaining the highest trust in their officials and employees. The people have a right to public officials and employees who are impartial and use independent judgment.

(b) The confidence and trust of the people erodes when the conduct of County business is subject to improper influence or even the appearance of improper influence.

(c) To guard against improper influence, the Council enacts this public ethics law. This law sets comprehensive standards for the conduct of County business and requires public employees to disclose information about their financial affairs.

(d) The Council intends that this Chapter . . . be liberally construed to accomplish the policy goals of this Chapter.⁹

The Ethics Law prohibits a person, including a contractor, from knowingly employing a public employee, unless the Ethics Commission permits it or the employee falls within certain exceptions.¹⁰ Furthermore, unless the Ethics Commission grants a waiver, the Ethics Law prohibits a public employee from: (1) being employed by any business that negotiates or contracts with the County agency with which the public employee is affiliated; or (2) holding any employment relationship that would impair the impartiality and independence of judgment of the public employee.¹¹

The Ethics Law also prohibits a public employee or former public employee from disclosing confidential information relating to or maintained by a County agency that is not available to the public, or using any confidential information for personal gain or the gain of another.¹²

3. The Commission's Waiver Authority.

The Ethics Commission may waive any prohibition of the Ethics Law or the Ethics-In-Public-Contract provision of the Procurement Law after receiving a written request for a waiver. The Commission may, for example, grant a waiver of the prohibitions of the Ethics Law and Sections 11B-51 and 11B-52(a) if it finds that: (1) the best interests of the County would be served by granting the waiver; (2) the importance to the County of a public employee or class of employees performing official duties outweighs the actual or potential harm of any conflict of interest; *and* (3) granting the waiver will not give a public employee or class of employees an unfair economic advantage over other public employees or members of the public.¹³

The Commission may waive the prohibitions of subsection 19A-12(b) if it finds that:

⁹ § 19A-2.

¹⁰ § 19A-12(d).

¹¹ § 19A-12(b).

¹² § 19A-18(a).

¹³ *Id.*

(1) the waiver is needed to ensure that competent services to the County are timely and available; (2) failing to grant the waiver may reduce the ability of the County to hire or retain highly qualified public employees; or (3) the proposed employment is not likely to create an actual conflict of interest.¹⁴

Analysis

If, as the DPW reported, the requester served as the Volunteer Fire Department's point of contact and coordinator for this project, attended and participated in all of the project's approximately five design review meetings, and provided written and verbal review comments, the requester certainly "significantly participated" in the matter. Indeed, even if, as the requester states, he had no involvement whatsoever in developing the design for the renovation project, had no input about the design, and made no changes to the design, his "signing off" on the final design drawings on behalf of his agency clearly constitutes "significant participation" in the matter. Therefore, a contractor engaged in a procurement matter with the County may not employ the requester unless this Commission permits it or the employee falls within certain exceptions—none of which apply on the facts in this matter.¹⁵

Furthermore, if the requester's private employer bids on the project and is awarded the contract, the requester then will be employed by a business that negotiates and contracts with the County agency with which the requester is affiliated, and, depending upon his duties at that time, he might hold an employment relationship that would impair the impartiality and independence of his judgment as a public employee.¹⁶

Finally, based on his activities as his agency's "point of contact and coordinator for" this project, the requester may have confidential information about this procurement that would benefit his private employer to the prejudice of the County or the other bidders.¹⁷

Conclusion

It is clear beyond dispute that both the requester and his or her private employer are subject to the foregoing restraints. The requester is a public employee for the purposes of the Ethics Law and the Procurement Law. Therefore, unless this Commission waives those prohibitions, the requester's private employer may not participate in the competition for the subject contract.

The requester has not presented and the Commission has not found any basis for concluding that: (1) the best interests of the County would be served by granting the waiver; or (2) the proposed employment is not likely to create an actual conflict of interest. On the contrary, the Commission finds that the granting of a waiver would be contrary to the best interests of the County in avoiding even the appearance of impropriety, and that the requester's private employment, as demonstrated by his attempt

¹⁴ § 19A-8(b).

¹⁵ See § 19A-12(d).

¹⁶ § 19A-12(b).

¹⁷ § 19A-18(a).

to represent both his private employer and his agency at the pre-bid conference would cause a conflict of interest in appearance and in actuality.

The requested waiver, therefore, was denied.

[signed]

Elizabeth Kellar, Chair

June 26, 2002